

E-Filed 9/13/2010

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

PATRICIA GALVIN,

Plaintiff,

V.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY, as Administrator and
Fiduciary of the Group Long Term Disability Plan
for Heller, Ehrman, White & McAuliffe; and THE
GROUP LONG TERM DISABILITY PLAN FOR
HELLER, EHRMAN, WHITE & MCAULIFFE,

Defendants.

Case Number 5:07-5195-JF/PVT

ORDER¹ RE COMPUTATION OF BENEFITS AND INTEREST DUE

Re. docket no. 49

On July 17, 2009, the Court entered judgment in favor of Plaintiff Patricia Galvin (“Galvin”) and indicated that “[i]f the parties [we]re unable to agree as to the method of calculating the benefits owed to Galvin, including any interest or applicable offsets, the Court w[ould] hold a further hearing for that purpose.” Dkt. 44 at 23. The parties have been unable to reach such an agreement, and Galvin now moves for a computation of benefits consistent with

¹ This disposition is not designated for publication in the official reports.

1 her calculations and an award of prejudgment interest at a specified rate. Defendants Provident
 2 Life and Accident Insurance Company and the Group Long Term Disability Plan for Heller,
 3 Ehrman, White & McAuliffe (collectively, “Defendants”) oppose the motion.

4 **I. CALCULATION OF BENEFITS**

5 Galvin contends that she is entitled to a total of \$806,865.20, exclusive of prejudgment
 6 interest, through July 2010. Defendants contend that Galvin’s “imprecise calculations and
 7 failure to account for [certain] offsets” result in her calculation of benefits being “off by at least
 8 \$32,654.18.” Opposition at 1-2. Both parties calculate the benefits due to Galvin in five distinct
 9 time periods based upon different applicable offsets. The Court will do the same.

10 **A. January 8, 2003 through January 4, 2004**

11 Galvin became disabled on January 8, 2003. The applicable ninety-day elimination
 12 period was satisfied on April 7, 2003. Galvin was earning an annual salary of \$203,000 at the
 13 time of her disability. The parties nearly agree on Galvin’s monthly benefit, with a difference
 14 between them of twenty-two cents. Galvin rounded her numbers to the nearest dollar for ease of
 15 calculation, and Defendants did not. However, Galvin has agreed to recalculate her figures using
 16 the twenty-two cent monthly deduction. Accordingly, the parties agree that the monthly benefit
 17 is \$11,277.78, or two-thirds of Galvin’s monthly salary.

18 The parties also agree that Galvin’s benefits during this period under the Plan should be
 19 offset by her California State Disability Insurance (“SDI”) benefit. Galvin received a weekly
 20 SDI benefit of \$602. The parties dispute the proper method of converting the SDI benefit from a
 21 weekly sum to a monthly amount. Defendants contend that the \$602 should be multiplied by
 22 fifty-two then divided by twelve. This calculation results in a total of \$2,608.67 per month.
 23 Galvin asserts that the monthly rate for SDI should be four times her weekly benefit, or \$2,408.
 24 While Galvin contends that her declaration is the only evidence in the record bearing on the
 25 monthly amount of SDI benefits, *see Galvin Decl., ¶ 2* (“[d]uring the period from January 8,
 26 2003, through January 4, 2004, I received State Disability benefits of \$602.00 per week, or
 27 \$2,408.00 per month”), the Court may take judicial notice of the fact that there are fifty-two
 28 weeks in a year. Fed. R. Evid. 201(b) (providing that a court may take judicial notice of a fact

1 that is not “subject to reasonable dispute [because it is] (1) generally known within the territorial
 2 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to
 3 sources whose accuracy cannot reasonably be questioned.”) The Court will adopt Defendants’
 4 proposed figure of \$2,608.67 per month. Accordingly, the monthly amount owed to Galvin by
 5 the Plan is \$8,669.11 (\$11,277.78 - \$2,608.67).

6 Galvin multiplies the monthly benefit (minus the SDI deduction) by nine based upon the
 7 period of time involved (April 7, 2003 through January 4, 2004). Defendants argue that Galvin’s
 8 calculation is incorrect because she did not begin receiving benefits until “mid-month.”
 9 Although the time period is nearly nine months, as contended by Galvin, the Court will prorate
 10 Galvin’s benefits as for April and January. Galvin is entitled to twenty-three days in April and
 11 three days in January. Opposition at 8 (asserting without opposition that Galvin is not entitled to
 12 benefits for the day she returned to work, January 4, 2004), which amounts to a total of
 13 \$7,513.23. The total amount due thus is $(\$8,669.11 \times 8) + \$7,513.23$, or \$76,866.11.²

14 **B. May 2, 2004 through August 1, 2004**

15 The parties agree that during this period Galvin received payment from Heller Ehrman
 16 that, when combined with her SDI benefits, equaled her full salary. Galvin Decl. ¶ 3. Galvin
 17 thus seeks only the minimum monthly benefit of \$100 under the policy. Defendants contest
 18 Galvin’s requested amount because the period begins on May 2, 2004 rather than May 1, 2004.
 19 Accordingly, they contend that because of this one day discrepancy Galvin’s request exceeds her
 20 entitlement by \$3.33. However, as Galvin asserts, the plan provides a minimum monthly
 21 payment of \$100 and provides no daily deduction. AR 2426. The Court thus concludes that
 22 Galvin is entitled to \$300 for the period between May 2, 2004 and August 1, 2004.

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24 ² Defendants also argue that they are entitled to an offset for “salary continuation” for
 25 April 8 and April 9, 2003. Opposition at 3, citing Gregory Declaration, ¶ 3, Ex. A (Heller
 26 Ehrman’s Mandatory Settlement Conference Statement in Galvin’s discrimination action).
 27 However, as Galvin points out, the document upon which Defendants rely, the Heller Ehrman
 28 Mandatory Settlement Conference Statement (“the Statement”), indicates that the salary
 continuation was “integrated with State Disability Insurance.” Accordingly, the amount has
 been offset already for SDI and need not be offset again.

1 Defendants also contend that Galvin received additional money in a settlement with her
 2 workers' compensation carrier (The Hartford) that extended the stated benefit beyond this
 3 period. Defendants argue that they are entitled to an offset for all workers' compensation
 4 benefits Galvin received and request that the Court order Galvin to disclose the settlement
 5 agreement in her suit against the Hartford to determine the extent of the offset.

6 Galvin declares that she "never filed a worker's compensation lawsuit relating to [her]
 7 employment with Heller, Ehrman, White & McAuliffe." Supplemental Declaration of Patricia
 8 Galvin ("Galvin Supp. Decl.") ¶ 1. She explains that she "believes that Heller Ehrman filed a
 9 worker's compensation claim on [her] behalf . . . without [her] knowledge." *Id.* ¶ 2. Galvin
 10 acknowledges that she "did receive a benefit check from Hartford Insurance in the amount of
 11 \$9,152.00. However, [she] wrote 'void' on the check and called Hartford and told them to
 12 cancel the payment. In a subsequent conversation with Hartford they told [her] that they had
 13 done so. The reason [she] had Hartford void the payment was that [she] didn't think [she] was
 14 entitled to the money, as [she] was receiving monies from Heller Ehrman that, when added to
 15 [her] State Disability payments, equaled [her] full salary." *Id.* ¶ 2; *see also id.*, Ex. 1 (photocopy
 16 of voided check from The Hartford in an amount of \$9,152.00 with an issue date of July 7, 2005
 17 and loss date of May 4, 2004.) In light of the evidence on the record, the Court is satisfied that
 18 Galvin did not sue The Hartford in a worker's compensation action and did not receive any
 19 related benefits. Accordingly, Defendants' request that Galvin be ordered to disclose a non-
 20 existent settlement agreement is moot.

21 **C. August 2, 2004 through February 1, 2005**

22 Galvin accidentally calculated this time period by multiplying her monthly benefit (less
 23 the offset of SDI benefits) by seven rather than six months. Defendants pointed out this error in
 24 their opposition papers, and Galvin concedes in her reply that the correct multiplier is six
 25 months. The parties make the same arguments concerning the proper method of calculating the
 26 monthly SDI offset that are addressed above. *See supra*, I.A. The Court again will adopt
 27 Defendants' method of calculation. During this time period, Galvin received weekly SDI
 28 benefits of \$728, or \$3,154.67 per month. Defendants also argue that Galvin is not entitled to

1 benefits for August 1, 2004. However, Galvin does not include August 1, 2004 in her
 2 calculation for this period, instead including February 1, 2005. Accordingly, the total amount
 3 owed is \$11,277.78 - \$3,154.67 (monthly benefit, minus SDI benefit) x 6 (number of months) =
 4 \$48,738.66.

5 **D. February 2, 2005 through May 31, 2007**

6 Galvin claims that during this twenty-eight month period she had not yet been awarded
 7 Social Security Disability benefits (“SSDI”) and that her state disability had run out. With
 8 respect to this issue, she argues that she is entitled to past due long-term benefits with no offset –
 9 \$11,277.78 (monthly benefit) x 28 (number of months) = \$315,777.84.

10 Defendants argue that “[g]enerally, state disability payments are paid for 52 weeks per
 11 claim.” Opposition at 6, citing Cal. Unemp. Ins. Code § 2653 (providing that “the maximum
 12 amount of benefits payable to an individual during any one disability benefit period shall be 52
 13 times his or her weekly benefit amount . . .”). Defendants therefore assert that Galvin “should
 14 have continued [to receive SDI benefits] through August 1, 2005.” Opposition at 6 (emphasis
 15 added). However, while Defendants request this offset, they present *no evidence* that Galvin in
 16 fact continued to receive SDI benefits after February 1, 2005. *See contra* Galvin Decl. ¶ 4
 17 (“through February 1, 2005, I received State Disability benefits of \$728.00 per week, or
 18 \$2912.00 per month.”) Defendants argue, and Galvin concedes, that there is no evidence in the
 19 form of documentation or correspondence from the California Employment Development
 20 Department (“EDD”) that reflects discontinuation of Galvin’s benefits. However, the Court
 21 concludes that Galvin does not bear the burden of demonstrating the absence of an offset.
 22 Accordingly, based upon the evidence in the record, Galvin is entitled to \$315,777.84 for the
 23 period from February 2, 2005 to May 31, 2007.³

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25 ³ At the hearing on August 13, 2010, counsel for both parties recognized the difficulty of
 26 obtaining records from the EDD for the time period beginning on February 2, 2005 and ending
 27 on August 1, 2005. The Court suggested that it could retain jurisdiction with respect to the
 28 computation of a possible offset of benefits for that period. The parties consented to the Court’s
 proposal. Accordingly, should Defendants obtain evidence from the EDD demonstrating that in
 fact Galvin did receive SDI benefits between February 2, 2005 and August 1, 2005, the Court

1 **E. June 1, 2007 through July 31, 2010**

2 In December 2008, Galvin was found eligible for SSDI benefits retroactive to June 1,
 3 Galvin's Motion, Ex. 2 (Social Security Administration award letter to Galvin dated
 4 December 9, 2008). Accordingly, on or about December 15, 2008, Galvin received retroactive
 5 SSDI benefits in a lump sum totaling \$36,624. *Id.* The lump sum amount reflects monthly
 6 payments at a rate of \$2,004.60 for the six-month period of June 1, 2007 through November 30,
 7 2007.⁴ Galvin is entitled to the \$11,277.78 (monthly benefit), minus \$2,004.60 (monthly SSDI
 8 offset), multiplied by thirty-eight (months in the period) = \$352,380.84.

9 **F. August 1, 2010 through present**

10 Galvin does not address this time period in her moving papers because the instant motion
 11 originally was set for hearing on June 11, 2010.⁵ The Court will adopt the same method utilized
 12 above to determine the daily benefit amount for this time period. Accordingly, Galvin is entitled
 13 to \$9,273.18 for the month of August 2010 (\$11,277.78 (monthly benefit), minus \$2,004.60
 14 (monthly SSDI offset)). She also is entitled to \$4,017.91 for the first thirteen days of September
 15 2010 (\$11,277.78 (monthly benefit), minus \$2,004.60 (monthly SSDI offset), divided by thirty
 16 days (\$309.07), multiplied by thirteen (number of days in September)).⁶

17 **G. Heller Ehrman Settlement Agreement**

18 Defendants contend that they are entitled to an additional offset for settlement benefits

21 will permit Defendants to submit such evidence and obtain the offset.

22 ⁴ Two costs of living increases were awarded. These increases do not affect the
 23 computation of benefits because they are excluded under the policy as exceptions to benefit
 24 offsets. AR 2435, item 1.

25 ⁵ On June 8, 2010, the Court approved a stipulation and order to continue the hearing on
 26 the motion from June 11, 2010 to July 2, 2010. Dkt. No. 54. On June 29, 2010, the Court
 27 granted Defendants' motion to continue the hearing until August 13, 2010 because of the
 excusable neglect of Defendants' counsel.

28 ⁶Because the parties did not brief the issue of Galvin's entitlement for the period, the
 Court will retain jurisdiction to consider any offsets that may be applicable.

1 that Galvin received from her lawsuit against Heller Ehrman.⁷ Pursuant to a settlement
 2 agreement entered into in October 2006, Galvin received a sum known to the parties for wage
 3 loss. Defendants argue that this amount should be considered income offsetting any amount to
 4 be paid as “income replacement” pursuant to Galvin’s disability insurance policy. *See* AR 2422.
 5 Defendants argue that damages for wage loss are equivalent to “salary continuation” payments
 6 which are listed specifically as an offset in the disability policy. AR 2434. In addition, the
 7 policy provides an offset for any amount received by compromise or settlement of salary
 8 continuation or severance pay. *Id.*

9 Galvin argues that Defendants, as affiliates of Heller Ehrman for the purposes of the
 10 settlement agreement, waived the right to claim any offset based on the settlement agreement
 11 under the release of claims provision in the agreement itself. She notes that the settlement
 12 agreement provides for a release of all claims not specifically excluded, and that the offset was
 13 not listed among the exclusions. However, the agreement also provides that Galvin’s right to
 14 bring a disability claim is limited to recovery of benefits under the Heller Ehrman Disability
 15 Plan. Defendants thus implicitly retained the right to assert all offsets contained in the Plan,
 16 including any offset for relevant settlement payments.

17 The Plan allows an offset for any amount received by compromise or settlement of a
 18 claim for salary continuation or severance pay applicable to the time in which disability benefits
 19 were available. AR 2434. Galvin contends that Defendants have failed to show that the amount
 20 she received for wage loss relates to the period of her disability. She notes that the payment
 21 conceivably could have been intended to compensate for a time prior to the date of her disability
 22 claim or when she briefly returned to work. However, because the agreement expressly settled a
 23 dispute regarding Galvin’s disability claims, and the relevant portion of the payment was

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 25 ⁷ To support their argument for an additional offset, Defendants requested the Court
 26 order production of the confidential settlement agreement between Galvin and Heller Ehrman.
 27 After reviewing the agreement *in camera*, the Court concluded that paragraph seven on page
 28 three of the agreement contained information relevant to the instant motion for computation of
 benefits. In light of the confidential nature of the agreement, the Court issued an order on
 August 18, 2010, adopting proposed safeguards and instructing Galvin to produce the settlement
 agreement to Defendants and asked both parties to brief the issue.

1 designated as wages in the settlement agreement, the Court concludes that Defendants are
2 entitled to an offset for the amount.

3 **H. Total amount owed without prejudgment interest**

4 Pursuant to the foregoing discussion, the Court finds that Galvin is entitled to the
5 following amounts, minus the offset for wages paid as part of her settlement with Heller Ehrman,
6 *see supra* I.G., and exclusive of prejudgment interest:

- 7 1. January 8, 2003, through January 4, 2004 = \$76,866.11
- 8 2. May 2, 2004, through August 1, 2004 = \$300.00
- 9 3. August 2, 2004, through February 1, 2005 = \$48,738.66
- 10 4. February 2, 2005, through May 31, 2007 = \$315,777.84
- 11 5. June 1, 2007 through July 31, 2010 = \$352,380.84
- 12 6. August 1, 2010 through present = \$13,291.09

13 TOTAL: \$807,354.54

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15 **II. PREJUDGMENT INTEREST**

16 **A. Whether prejudgment interest should be awarded**

17 "Whether to award prejudgment interest to an ERISA plaintiff is a question of fairness,
18 lying within the court's sound discretion, to be answered by balancing the equities." *Landwehr v.*
19 *DuPree*, 72 F.3d 726, 739 (9th Cir. 1995) (internal citation and quotations omitted). "Among the
20 factors to be considered in determining whether prejudgment interest should be awarded is the
21 presence or absence of bad faith or ill will." *Id.* (internal citation and quotations omitted).

22 Defendants contend that prejudgment interest should not be awarded because the Court
23 did not make an express finding of bad faith and recognized that Defendants had "some basis"
24 for their concerns with respect to Galvin's claims. Dkt. No. 44 at 2. However, as Galvin points
25 out, the Court did observe that Defendants "consistently [] rejected Galvin's claim as
26 unsubstantiated by objective medial data" despite the fact that "Galvin 'ha[d] been examined and
27 treated by numerous physicians, many of whom ha[d] documented her pain, and none of whom
28 ha[d] questioned its existence or believed it to be less severe than Galvin herself ha[d] described

1 it.” *Id.* Moreover, the Court noted the Ninth Circuit’s observation that “individual reactions to
 2 pain are subjective and not easily determined by reference to objective measurements.” *Saffron*
 3 *v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 872 (9th Cir. 2008); *id.* at 873
 4 (suggesting that an insurer, by demanding objectively verifiable evidence of pain, might be
 5 requiring “evidence that simply is not available.”) Finally, Galvin has been denied the ability to
 6 invest and earn interest on the benefits owed to her for approximately seven years. Accordingly,
 7 the Court concludes that the equities favor an award of prejudgment interest.

8 **B. Prejudgment interest rate**

9 “Generally, ‘the interest rate prescribed for post-judgment interest under 28 U.S.C. §
 10 1961 is appropriate for fixing the rate of pre-judgment interest unless the trial judge finds, on
 11 substantial evidence, that the equities of that particular case require a different rate.’”
 12 *Blankenship v. Liberty Life Assur. Co.*, 486 F.3d 620, 628 (9th Cir. 2007), quoting
 13 *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1164 (9th Cir. 2001) (citation
 14 omitted). “‘Substantial evidence’ is defined as ‘such relevant evidence as a reasonable mind
 15 might accept as adequate to support a conclusion.’” *Id.*, quoting *Blanton v. Anzalone*, 813 F.2d
 16 1575, 1576 (9th Cir. 1987) (holding that the district court abused its discretion by awarding, on
 17 an ERISA award, a prejudgment interest rate below the Treasury bill rate without making a
 18 finding as to the equities which justified the departure) (citations omitted). “The court may
 19 compensate a plaintiff for ‘the losses he incurred as a result of [the defendant’s] nonpayment of
 20 benefits.’” *Id.*, quoting *Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 988 (9th Cir.
 21 2001).

22 Galvin argues that the interest rate prescribed by 28 U.S.C. § 1961 would not
 23 “compensate [her] for ‘the losses [s]he incurred as a result of [Defendants’] nonpayment of
 24 benefits.’” *Dishman*, 269 F.3d at 988 (recognizing the Court’s authority to “choose an interest
 25 rate that compensates” the plaintiff, but holding that the district court abused its discretion in
 26 awarding a sixteen percent prejudgment interest rate on an ERISA award-double the rate of
 27 return on the defendant’s investment portfolio-because “[p]rejudgment interest is an element of
 28 compensation not a penalty.”); *Blankenship*, 486 F.3d at 628 (affirming the trial court’s award

1 of prejudgment interest at a rate of 10.01%, compounded monthly, based upon plaintiff's
 2 demonstration that but for the insurer's failure to pay benefits, he would have had his own funds
 3 invested at that rate.) Galvin contends that but for Defendants' failure to pay, she would have
 4 invested her money in various instruments that earned interest at a weighted average rate of
 5 4.374 percent between April 2003 and the present. Declaration of Patricia Galvin ("Galvin
 6 Decl.") ¶¶ 5-13; *see also* Galvin's Motion, Ex. 3 (interest rate computation performed by J.
 7 Michael Barrick, MBA, EA, CFS); Ex. 4 (Various statements from the above-referenced
 8 investment institutions).

9 Defendants contend that the Court should adopt the interest rate prescribed by 28 U.S.C.
 10 § 1961. § 1961 provides that the "interest shall be calculated from the date of the entry of the
 11 judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as
 12 published by the Board of Governors of the Federal Reserve System, for the calendar week
 13 preceding the date of the judgment." These amounts for the relevant period are as follows:
 14 1.24% in 2003; 1.89% in 2004; 3.62% in 2005; 4.94% in 2006; 4.53% in 2007; 1.83% in 2008;
 15 and 0.47% in 2009. Declaration of Catherine Gregory ("Gregory Decl.") ¶ 7. The average yield
 16 for the first seven months of 2010 is 0.36%. *Id.*

17 While the Court concludes that the equities favor an award of prejudgment interest,
 18 because there was "some basis" for Defendants' concerns with respect to Galvin's claims and
 19 there has been no finding of bad faith, the Court will calculate the prejudgment interest at the
 20 rate prescribed by 28 U.S.C. § 1961. *Blankenship*, 486 F.3d at 628, quoting *Grosz-Salomon*, 237
 21 F.3d at 1164 (holding that "the interest rate prescribed for post-judgment interest under 28
 22 U.S.C. § 1961 is appropriate for fixing the rate of pre-judgment interest unless the trial judge
 23 finds, on substantial evidence, that the equities of that particular case require a different rate.").

24 IV. ORDER

25 Good cause therefor appearing, the Court concludes that Galvin is entitled to
 26 \$807,354.54 in benefits owed, minus the offset for wages paid as part of her settlement with
 27 Heller Ehrman, *see supra* I.G., plus pre-judgment interest at the rate provided under 28 U.S.C. §
 28 1961. Galvin's request that Defendants reinstate her benefits immediately is GRANTED. The

1 parties shall meet and confer to provide an accurate calculation of the total amount of pre-
2 judgment interest.

3 **IT IS SO ORDERED.**

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5 DATED: 9/13/2010

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JEREMY FOGEL
United States District Judge